

Resolution No.:	<u>17-780</u>
Introduced:	<u>June 11, 2013</u>
Adopted:	<u>June 11, 2013</u>

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY, MARYLAND**

By: District Council

SUBJECT: APPLICATION NO. G-881 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Jody S. Kline, Esquire, Attorney for the Applicants, Theodore H. Butz, et al; OPINION AND RESOLUTION ON APPLICATION; Tax Account No. 02-00030041

OPINION

Application No. G-881, filed on April 29, 2009, requests reclassification of approximately 54.34909 acres of land (gross tract) in Germantown from the RE-2 Zone (Single-Family, Detached, on two-acre lots) to the Planned Retirement Community (P-R-C) Zone. The subject site is described as Parcel P429 on Maryland Tax Map FV 122, and is also known as the "Butz Property" or the "Water Tank Farm Property." The property is located at 21901 Ridge Road, in Germantown, Maryland, just west of Ridge Road (MD 27), north of Brink Road and east of the Brink Meadows Subdivision. The property is owned by Applicants, Theodore H. Butz, et al.

The site will be developed with 140 age-restricted, single-family homes¹ (at least 85% detached), a small community center, parking and internal roads. At least 12.5% of the homes (*i.e.*, 18 units) will be Moderately Priced Dwelling Units (MPDUs). The age restriction, in accordance with the P-R-C Zone's requirements, will limit residence to those 50 years of age and older, and disabled relatives. Zoning Ordinance §59-C-7.44(a). The proposed development will be called "The Courts at Clarksburg" and will be subject to preliminary plan and site plan approval by the Planning Board.

The application for rezoning was reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission, and in a report dated December 7, 2012, Staff recommended denial of the application. Exhibits 53. The Montgomery County Planning Board considered the application on December 20, 2012 and, by a vote of 5 to 0, recommended

¹ The original development plan (Exhibit 8), filed in 2009, called for 221 dwelling units.

approval. The Board's recommendation is contained in a letter to the Hearing Examiner dated January 4, 2013. Exhibit 54.

This application is supported by Elm Street Development, the developer of Clarksburg Village (Exhibits 60, 80(c) and 97), and by a number of individual County residents (not immediate neighbors of the site) who desire more senior housing in the County. Exhibits 50, 58, 59, 73, 75, 76, 77, 81 and 82. The application is opposed by the Greater Goshen Civic Association (GGCA), the Clarksburg Civic Association (CCA) and numerous neighbors. Exhibits 48(a), 51, 52(a) and 52(b). Concerns expressed by the civic associations and the neighbors include the adding of density to the area, alleged Master Plan non-compliance, potential traffic impacts, lack of on-site recreational facilities, inadequate screening, noise, dust, light pollution, loss of pastoral scenery, possible breeding of mosquitoes in the proposed stormwater management ponds and effect on property values.

The public hearing was held, as scheduled, on January 14 and 18, 2013, and testimony was presented by Applicants' witnesses and by opposition witnesses from the Greater Goshen Civic Association and from the adjacent neighborhood. A revised Development Plan was timely filed as Exhibit 94(a), and the record closed as scheduled on February 5, 2013.

The Hearing Examiner recommended approval on grounds that the proposed development satisfies the purpose and standards of the P-R-C Zone (provided that the Council approves unrestricted public sewer service for the property); meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance; will be compatible with development in the surrounding area; is substantially consistent with the Clarksburg Master Plan; and will be in the public interest. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation, dated March 19, 2013, is incorporated herein by reference. Based on its review of the entire record, the District Council finds that the application does meet the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

The subject site is within the "Brink Road Transition Area" of the 1994 Clarksburg Master Plan and Hyattstown Special Study Area, and it is currently being used as farmland. Technical Staff describes the property as follows (Exhibit 53, p. 2):

. . . The Property has approximately 2,860 feet of road frontage along the western side of Ridge Road, with 730 feet of frontage along the north side of Brink Road. The Property is vacant; used primarily for agricultural production. The topography consists of generally level terrain, with a minimal amount of steep slopes isolated to the man-made embankment along Ridge Road.

The Property is within the Little Seneca Creek watershed and drains to an unnamed tributary to Little Seneca Creek beginning on the adjacent property to the west and flows westward. This Property does contain a stream valley buffer that is associated with this off-site stream. In addition, the Property contains approximately 0.21 acres of forest in one stand located on the northwest corner. This forest is considered a moderate priority for retention, based on its function.

Staff also notes that the site is located within the Clarksburg Special Protection Area (SPA), and there are no streams, floodplains or wetlands on the site. Exhibit 53, p. 8. Applicants' land planner, Gary Unterberg, described the subject property as "open" and "generally rolling." 1/14 Tr. 79. The slopes are four to five percent. There are some flat areas and some steeper areas, with a ridge line along Ridge Road. The property falls to the west from Ridge Road, which is the high line. There are several ridges and several drainage ways that traverse through the property, and there is an existing gas easement that bisects the southern portion of the property. It is the Atlantic Seaboard right-of-way for liquid gas transmission that is found running through the County. The only forest on the site is located in the upper, northwestern corner of the property. It is under half an acre, and part of that forest will be impacted by A-305, the Master Plan road that comes through the site. 1/14 Tr. 79-80.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, the Hearing Examiner modified the surrounding area proposed by Applicants to include properties east of Ridge Road, some of which confront the subject site across Ridge Road. The surrounding area is defined as follows:

1. To the north, the surrounding area is generally bounded by Little Seneca Parkway;
2. To the east, the area is bounded by the eastern property lines of the properties east of and adjacent to Ridge Road;
3. To the south, the surrounding area generally follows the southern boundary of Seneca Crossing Park and Seneca Crossing Drive; and
4. To the west, the surrounding area follows North Fredrick Road (MD 355) to its intersection with Brink Road, then continues north along Greenbrook Drive and the western edge of the planned greenbelt buffer for Clarksburg Village.

Technical Staff endorsed the Hearing Examiner's re-definition of the surrounding area (Exhibit 85), as does the District Council. An amended Surrounding Area Map was entered in the record as Exhibit 64, and an amended aerial photo of the surrounding area was entered into the record as Exhibit 65, both showing the enlarged surrounding area including locations east of Ridge Road as far north as Little Seneca Parkway.

Technical Staff described the surrounding area as follows (Exhibit 53, pp. 2):

The Property is on the easternmost edge of the Clarksburg Master Plan ("Master Plan") area. North of the Property is the residential community of Greenridge Acres, zoned R-200; however, immediately adjacent to the north and northwest of the Property is the Yegher property, zoned Country Inn. The Yegher property is also known as the Howes Farm (#13/19), an individually designated site listed in the Master Plan for Historic Preservation To the east of the Property, and across

Ridge Road (MD 27) are several single-family residential dwellings, the Washington Suburban Sanitary Commission [WSSC] Brink Road water tower, All Souls Cemetery in the Residential Density Transfer (RDT) Zone. To the immediate west of the Property is additional one-family residences [in the Brink Meadows subdivision] zoned RE-2. South of the Property and across Brink Road is Ridge Road Recreation Park, zoned R-200 . . .

The RDT zoned land across Ridge Road to the north and east of the WSSC property has been sold to the Catholic Church and is now going to be used as a cemetery. The cemetery was authorized by a special exception granted on January 18, 2000, by the County Council in Resolution 14-393 (Exhibit 71). 1/14 Tr. 20-23.

Applicant Thompson Butz testified that his property is the last traditional row-crop farming in the area. 1/14 Tr. 18. His testimony on this point was echoed by the testimony of Mr. Unterberg, who stated that the neighborhood is primarily developed land, except for the subject site. In addition to the residential areas to the west (Brink Meadows subdivision) and north of the site (Green Ridge Acres), there are four houses directly across Ridge Road, to the east of the site, and additional houses northeast of the site, along Ridge Road, just south of Little Seneca Parkway. However, the area to the east is primarily zoned RDT (Rural Density Transfer Zone). 1/14 Tr. 77-78, 98-101.

The zoning history of the subject site was set forth in the Technical Staff report (Exhibit 53, p. 3):

Upon the adoption of the 1958 Zoning Ordinance, the Property was incorporated into the Regional District and classified in the R-R (Rural Residential) Zone, which allowed lots no smaller than one-half acre. Zoning text amendment 73013, in 1973 renamed the R-R Zone to the R-200 Zone, and in 1974 this Property was reclassified to the R-200 Zone, per SMA F-925. Subsequently, this Property . . . [was] reclassified to the RE-2 Zone per SMA G-710, which implemented the recommendations of the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area*.

The Applicants seek to reclassify the subject site to the P-R-C Zone in order to develop their property with 140 age-restricted single-family homes (at least 85% detached), a small community center, a community garden, parking and internal roads. At least 12.5% of the homes (*i.e.*, 18 units) in “The Courts at Clarksburg” will be Moderately Priced Dwelling Units.

Snowden Farm Road (A-305/M-83) will be extended across the property from east to west, thus creating two development areas, a large southern area (designated Area “A” on the development plan, Exhibit 94(a)), and smaller northern area (designated Area “B”). Exhibit 53, p. 4. The construction of the extended roadway will reportedly be done by Elm Street Development, the lead developer of Clarksburg Village. 1/14 Tr. 24.

Applicants’ vision is that, in addition to the amenities available on site (*i.e.*, a small community center, a pedestrian and bike system and community gardens), considerable off-site

amenities and services will be easily accessible at the nearby Ridge Road Recreational Park, in Clarksburg Village and beyond. Mr. Butz testified that this development will be part of the "Greater Clarksburg Village," in accordance with an agreement with Elm Street Development (Exhibits 60 and 80(c)),² the details of which have not been worked out. That is important because it allows the residents of this community access to the amenities, trails and other aspects in Clarksburg Village. 1/14 Tr. 36.

Mr. Butz stated that the proposed development will create a lifestyle for active adults, and for them to be able to take advantage of the amenities of Clarksburg Village, the amenities within Milestone Shopping Center, and the amenities within Germantown Town Center, where there is everything from performing art centers to libraries, medical facilities, three or four grocery stores and book stores. Right across Brink Road from this property is the Ridge Road Recreational Park, which has tennis courts, ball fields and dog walks. Milestone Shopping Center is less than a mile from the subject site, and it has the Suburban Fitness Center, which offers a gym and therapeutic services. The new Wegmans is going to be at Milestone. Also located there are a Home Depot, a Wal-Mart, a Best Buy, an AT&T store and three or four restaurants. 1/14 Tr. 52-54.

Thus, the subject site is near to both major retail and recreational activities, and as stated by Mr. Butz, "tremendous transportation infrastructure." In his opinion, two-acre, single-family homes with well and septic construction do not make sense in an area adjacent to major roads and on land that will be bisected by a four-lane arterial road (A-305). "It simply is not smart growth." 1/14 Tr. 27-28, 40-51. Applicants therefore considered more appropriate land use options, and given the aging "baby boomer" population, and the need in the County for senior housing, the P-R-C Zone made sense to them. 1/14 Tr. 27-28.

Mr. Butz also referenced three studies relating to housing for seniors to support Applicants' argument that this type of senior housing is needed in the County – "55+ Housing Preference Survey," produced by the County's Department of Parks and Planning (labeled "SR-5" in Applicants' Technical Appendix (Exhibit 34(b))); "Beyond 50.05: a Report to the Nation on Livable Communities: Creating Environments for Successful Aging" produced by AARP (labeled "SR-7" in Exhibit 34(b)); and "Montgomery County's Aging Population is Growing Rapidly," a brief squib on American University's website on June 2, 2011, quoting Rollin Stanley, former director of the County's Planning Department (Exhibit 61). Mr. Butz concluded that there is substantial statistical data to support a need in this area for a planned retirement community, and there is a demand for this type of housing within the I-270 corridor. Applicants' Technical Appendix (Exhibit 34(b)) also contains a wealth of additional materials supporting their contention that there is a need for this type of housing in the County.

² In Exhibit 60, David Flanagan, the President of Clarksburg Village Investments, Inc., expresses his support for the subject application because it will fill a need for senior housing near Clarksburg Village. Mr. Flanagan notes that he would like to incorporate the development into the Clarksburg Village Homeowners Association (CVHOA) and to make the primary entrance to Clarksburg Village from MD 27 (Ridge Road) through the Butz property. In Exhibit 80(c), Kathryn Kubit, a Vice President of Elm Street Development who testified at the hearing (1/14 Tr. 251-274), reiterated Elm Street's support for the Butz application and characterized the project as "a great addition to the Clarksburg community." Ms. Kubit stated that Elm Street had "extended the invitation for the future residents of the Butz project to use the recreational facilities within Clarksburg Village and to join the Clarksburg Village HOA."

The Opposition attempted to challenge the proposition that there was a need for more senior housing in the County by mentioning the existence of other senior facilities (1/18 Tr. 182-185), and the Hearing Examiner invited the Opposition to submit a list of comparable senior housing in the County so that their claim could be evaluated, but they did not do so (1/18 Tr. 185). The Hearing Examiner concluded that the overwhelming weight of the evidence establishes a need in the County for the type of senior housing being proposed by Applicants. The District Council agrees with this assessment.

Although forest conservation is an environmental issue, it also bears significantly in this case on the question of how Applicants plan to screen the proposed development from the adjacent neighbors, especially those to the west and the north. Applicants' plans show on-site afforestation to the north, to the west, and to the south, on the corner of Brink Road and Route 27, all of which will provide screening for the surrounding area. 1/14 Tr. 80-84. The afforestation areas are depicted in Applicants' approved Preliminary Forest Conservation Plan (PFCP -Exhibit 41(c)).

Dusty Rood, Applicants' expert in environmental planning, water quality and forest conservation, testified that Applicants will be adding approximately 7.2 acres of additional forest to the property, which is about 35 times the amount of existing forest. These areas will be protected in perpetuity through a Category One Conservation Easement, which is the most restrictive of easements that is entered into with the Planning Board. All three of these planting areas will probably be planted with a mix of evergreen and deciduous species to create a diverse forest community that will provide screening and transition to the adjacent neighborhoods. 1/18 Tr. 75-77. In addition to the afforestation areas, Applicants plan a significant amount of green areas surrounding the planned structures and internal road systems, which will aide in screening and transition. These green area are shown in Applicants' "Green Edge" Exhibit (Exhibit 34(j)).

Applicants seek permission to use public sewer, rather than septic facilities envisioned in the 1994 Clarksburg Master Plan and apparently advocated by Technical Staff (Exhibit 53, p. 1, third bullet). As will be discussed below, Applicants introduced unrefuted evidence that their proposed use of the public sewer system would be much more environmentally friendly than septic systems, and indeed would be legally required for the subject site. 1/18 Tr. 109-117. They argue strenuously, and the District Council concludes correctly, that the Master Plan is outdated on this point. 1/18 Tr. 193-194.

Pursuant to Code §59-D-1.1, development in the P-R-C Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the P-R-C Zone. The Development Plan, and the Land Use Plan that constitutes one of its primary parts, are binding on the Applicants except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The revised land use plan for the present zoning application, Exhibit 94(a), is titled "Development Plan - Land Use Element." A copy of the Development Plan (Exhibit 94(a)) is

reproduced in the Hearing Examiner's report, and the textual binding elements are set forth below:

**DEVELOPMENT PLAN NOTES:
BINDING ELEMENTS:**

1. The development plan depicts the overall concept for the orderly and staged development of The Courts at Clarksburg; a planned retirement community made up of interdependent phases. This development plan depicts that element of the Planned Retirement Community that is to be developed in accordance with provisions of the Zoning Ordinance applicable to the PRC Zone. It is anticipated that revisions to the development plan may become necessary as the entire Community evolves. This development plan reflects the proposed Community as it is presently envisioned.
2. Densities, use, and mix of housing types are as specified in the appropriate tables for A and B. Building and parking locations will be approximately as shown. Specific building locations, footprints, parking locations and other design details will be refined and finalized during subsequent subdivision and site plan proceedings.
3. Impervious Area to be up to 28% based on a net acreage of 49.4 AC.

A Predominantly Detached Residential w/ Attached Residential Up To 35 feet in Height Approximately 38.9± Acres		
Residential	# Units	Parking Spaces
Detached/ Attached*	100 - 130	200 - 260
Other	#	Parking Spaces
Community Center	1	TBD

B Predominantly Detached Residential w/ Attached Residential Up To 35 feet in Height Approximately 10.5± Acres		
Residential	# Units	Parking Spaces
Detached/ Attached*	25 - 35	50 - 70

PRC Yield Summary			
Residential			
Detached	Minimum	85%	119 Units
Attached*	Not to Exceed	15%	21 Units
Total	Not to Exceed		140 Units
Other			
Community Center	Size to be determined at Preliminary Plan		
Binding Element for Age Restriction: Residency is restricted to permanent residents 50 years of age or over except: (a) a disabled relative may reside with a permanent resident; and (b) any person eligible for residency as described in Section 59-C-7.44 ("Age of residents, residential densities and MPDU"), or its successor, after the date of approval of this development plan.			

**Attached" Residential describes a dwelling unit commonly referred to in the age restricted housing industry as a "villa". An attached residential unit (villa) will be a two story structure containing a first floor master bedroom.

The key aspects of the proposal are that the site will be developed with up to 140 age-restricted single-family homes; that at least 85% of these homes will be detached; that at least 12.5% of the homes (*i.e.*, 18 units) will be MPDUs; that building heights will not exceed 35 feet; that the impervious area will not exceed 28%; that residents will be limited to those 50 years of age and older and disabled relatives, in accordance with the P-R-C Zone's requirements; that a community center will be constructed; that sufficient on-site parking will be provided; and that approximately 4.9 acres of land will be dedicated along Snowden Farm Parkway (A-305), Brink Road and Ridge Road (MD 27). The proposed development will be called "The Courts at Clarksburg" and will be subject to preliminary plan and site plan approval by the Planning Board.

The above Development Plan reflects four changes that were made to it as a result of the hearing:

1. The potential percentage of attached units was reduced from 20% to 15%;
2. The following Binding Element was added to address a concern of the neighbors:
Binding Element for Age Restriction:
Residency is restricted to permanent residents 50 years of age or over except:
(a) a disabled relative may reside with a permanent resident; and (b) any person eligible for residency as described in Section 59-C-7.44 ("Age of residents, residential densities and MPDU"), or its successor, after the date of approval of this development plan.
3. A description of "Attached" units was added; and
4. A note was added to ameliorate a concern of the adjacent neighbors to the west about the adequacy of screening next to the "dry pond" stormwater management facilities planned for the site:

Applicant will plant screening trees in the area adjacent to the proposed extended detention (dry) ponds shown on Exhibit 34-S to the extent that governmental agencies allow reduction in the size of SWM facilities as determined by final agency design approval. If no space for additional planting is created on the subject property by the final agency design approval, screening trees will be installed on Lot 2, Lot 12 and Outlot A along the common boundary line with the subject property, in accordance with a letter of agreement between the Applicant and the owners of said lots.

In this connection, the District Council notes that it does not intend to preclude a reduction in the size of the stormwater ponds to allow more screening on the western edge of the site, should the Planning Board determine that is advisable at Site Plan and Subdivision reviews.

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for re-zoning to the P-R-C Zone, to consider whether the application, including the development plan, fulfils the "purposes and requirements" set forth in Code Section 59-C for the new zone. In making this determination, Zoning Ordinance §59-D-1.61 expressly requires the District Council to make five specific findings, and Maryland law requires that zoning power be exercised in the public interest.

§59-D-1.61(a): Substantial Compliance with Master Plan and other County Policies.

The first required finding is substantial compliance with the use and density requirements of the Master Plan and with other County plans and policies.

The subject site is located within the area governed by the Clarksburg Master Plan and Hyattstown Special Study Area, approved and adopted in 1994. For the reasons discussed extensively in Part III.D.3 of the Hearing Examiner's report (pp. 32-41), the District Council finds that the proposed development substantially complies with the use and density recommendations of the Master Plan, when one interprets the Master Plan with due consideration for its goals and objectives and in light of developments since it was adopted. The proposed use is residential, which is consistent with the use proposed by the Master Plan, and the proposed density of 2.6 dwelling units per acre is consistent with the density of "two to four units per acre" recommended on page 75 of the Master Plan for the Brink Road Transition Area; however, it is inconsistent with the density recommended for the site elsewhere in the Plan based on the supposed unavailability of public sewer service. Master Plan pp. 77 and 97.

Because of the recommendations found on pages 77 and 97 of the Master Plan, Technical Staff concluded that the proposed Development Plan fails to comply with the Master Plan's density recommendations. The Planning Board rejected Technical Staff's interpretation of the Master Plan, stating (Exhibit 54):

The Planning Board further concluded that the local map amendment application substantially complies with the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area*. The Planning Board believes that proposed rezoning and associated Development Plan meet the overall goals and density of the Brink Road Transition Area and provide an appropriate transition from the Germantown Master Plan Planning Area to the Clarksburg Master Plan Area.

The Board weighed these elements against the density recommendation on the master plan zoning map and considered them more persuasive and a stronger indicator of the master plan's objectives. The Development Plan provides a low density transition which, coupled with the forest buffers and setbacks, provides compatibility with the surrounding community.

The District Council agrees with the Hearing Examiner that the Planning Board's unanimous interpretation of its Clarksburg Master Plan is more persuasive than Technical Staff's interpretation, and more likely to produce a result in the public interest.

The General Plan incorporates the applicable Master Plan, and therefore compliance with the Master Plan is tantamount to compliance with the General Plan. In addition, for the reasons set forth on pages 40-41 of the Hearing Examiner's report, the District Council concludes that the provision of additional housing for seniors in the County is consistent with the goals of both the Clarksburg Master Plan and the Housing Element of the General Plan.

Applicants specify in their Land Use and Engineering Report revised in July of 2012, that “This proposal will not require any County funded capital improvement program to be implemented.” Exhibit 34(a), p. 22. Although a series of road improvements are planned in the area to be funded by other developers, “the Courts [of Clarksburg] Development will not rely on the timing of adjacent road construction . . .” Exhibit 34(a), p. 15.

The District Council finds, based on the evidence of record, that the proposed development is consistent with the General Plan and does not impact the County’s Capital Improvements Program.

Under the County’s Adequate Public Facilities Ordinance (“APFO,” Code §50-35(k)), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether the following public facilities will be adequate to support a proposed development: transportation, schools, water and sewage facilities, and police, fire and health services. The Planning Board’s application of the APFO is limited by parameters that the County Council sets in its Growth Policy.³ While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council’s determination in a rezoning case as to whether the reclassification would serve the public interest.

The Planning Board considers the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated. There is no such evidence in this case. On the contrary, the evidence is that both police and fire stations are nearby. Exhibit 53, p. 5.

The remaining three public facilities – transportation, schools and water and sewer service – were discussed at length in Part III.D.4 of the Hearing Examiner’s report (pp. 41-50).

1. Transportation:

There are three roadways that will service the proposed development – Ridge Road (MD 27), Snowden Farm Parkway (M-83/A-305) and Brink Road (A-36). Snowden Farm Parkway will be constructed by Elm Street Development, which is developing much of Clarksburg Village. Access to the subject site would be from Brink Road and from Snowden Farm Parkway (A-305), extended. The Snowden Farm Parkway access includes two entry points, one to Area A on the south and the other to Area B on the north. The Development Plan proposes internal public streets within 50-foot wide rights-of-way, and single five-foot sidewalks, connecting to a trail that allows pedestrian access to Ridge Road Recreation Park, south of the site, across Brink Road. There is one Montgomery County Ride-On route serving this area, Route #79. This route runs from the Clarksburg Town Center to the Shady Grove Metro station. Exhibit 53, p. 7.

The opposition expressed concerns about the level of traffic that would be produced by the proposed development and for the safety of pedestrians attempting to cross Brink Road to

³ In 2010, the County Council changed the name of the Growth Policy to the Subdivision Staging Policy, but both Zoning Ordinance §59-H- 2.4(f) and APFO Code §50-35(k)) still refer to the Council’s Growth Policy.

access Ridge Road Recreation Park and those attempting to cross Snowden Farm Parkway (A-305) within the development. Mary Jane Goodrick, testifying on behalf of the Greater Goshen Civic Association (GGCA), predicted that A-305, which goes through the property, will create a tremendous amount of vehicular traffic to and from Clarksburg. Ridge Road and Brink Road will also carry a large volume of traffic. She questioned whether seniors will be able to cross those large roads. Ms. Goodrick testified that GGCA is opposed to this zoning change due to the proposed density and because seniors will be placed in a property surrounded by major traffic, while being unable to exit the property without crossing a major road, whether as a pedestrian or by vehicle. 1/18 Tr. 175-181.

William Hancock testified that he lives in a home that backs up to the Butz property, and he experiences a traffic problem all the time. He added that there is a blind hill on Brink Road and that cars come down at 45 to 50 miles an hour. 1/14 Tr. 288-290.

Ron Wills also expressed concern about the safety of the intersection of Ridge Road and A-305. He estimates that the speed limit will be 40 mph and thinks it will be problematic, splitting the neighborhood in half. This will be a major entrance to Clarksburg Village, so he believe there will be a great deal of traffic. 1/14 Tr. 281-285.

Applicants responded to these concerns with the testimony of Wes Guckert, an expert in transportation planning. 1/18 Tr. 17-68. Mr. Guckert prepared a traffic impact study (Exhibit 38(a)) of the intersections specified by Technical Staff – Route 27 at Brink Road and Route 27 at Skylark Road. He also analyzed the site access intersections, Route 27 and Snowden Farm Parkway, and the Brink Road southern site access. Applying the standard Local Area Transportation Review (LATR) guidelines and Montgomery County trip generation rates, he determined the amount of traffic that will be generated by developments in the pipeline (denominated “Background Traffic”) and added that to traffic counts (*i.e.*, “Existing Traffic”) at the studied intersections. Mr. Guckert then determined the amount of traffic that would be generated by the proposed development, utilizing the Institute of Transportation Engineers trip generation formula for senior adult housing (Exhibit 91). Mr. Guckert estimated that the 140 senior units would generate about 30 morning peak-hour trips, and about 38 evening peak-hour trips (Exhibit 38(a), p. 21). Mr. Guckert then determined the total peak hour traffic by standard critical lane volume (CLV) analysis, using the procedures set forth in the guidelines. He found that the studied intersections at Route 27 and Snowden Farm Parkway (A-305), Brink Road, and Skylark Road, would all fall within the acceptable standards determined by the Planning Commission staff, which is a CLV of 1,425 during the peak hour. 1/18 Tr. 17-23. These results can be seen in a chart in Mr. Guckert’s traffic study (Exhibit 38(a), p. 24).

Mr. Guckert further testified that in his opinion, there is no need for transportation network improvements before Applicants have occupancy and generate traffic from the proposed units. Mr. Guckert concluded that the surrounding transportation network is adequate to handle the traffic that would be generated by the proposed development. 1/18 Tr. 26-28.

Both the M-NCPPC Technical Staff (Exhibit 53, p. 7) and the State Highway Administration (Exhibit 90, p. 2) concurred with Mr. Guckert’s report and findings. As stated by Technical Staff, “It is anticipated that the proposed development will meet Local Area

Transportation Review (LATR) requirements of the Adequate Public Facilities (APF) review.” Exhibit 53, p. 7.

Mr. Guckert also performed a Policy Area Mobility Review (PAMR), and he estimated the PAMR assessment for the project. The proposed Courts at Clarksburg project is in the Clarksburg policy area. For fiscal year 2012, 10 percent of the new trips must be mitigated, or a fee of \$11,700 must be paid for 10% of the trips. Ten percent of 38 trips rounds off to four trips, which must be multiplied times \$11,700. The resulting PAMR mitigation payment, is \$46,800, as shown on page 26 of his traffic impact study. 1/18 Tr. 28-32. Technical Staff confirmed that a PAMR payment of \$46,800 will likely be required.⁴ Exhibit 53, p. 7.

In Mr. Guckert’s opinion, the proposed circulation systems for pedestrians, vehicles, and bicycles will be safe, adequate and efficient. 1/18 Tr. 33. He estimates that the top third of the development, north of A-305, will exit onto A-305. The middle half of the project will likely exit onto A-305, as well. The southern half of the project, for the most part, is likely to exit out onto Brink Road. With about 40 peak-hour trips, there will be about one car every four to five minutes coming out each of the three entrances. In his opinion, it will have a very small impact on traffic. Mr. Guckert further testified that in his opinion, the access and the sight distance at the Brink Road access point would be safe and satisfactory. He opined that a crosswalk located around the southern access point to the project, crossing Brink Road, would be a safe crossing point for pedestrians. The sight distance that is required by the Department of Transportation is not just for cars; it is for pedestrians as well. In his opinion, there would be no safety issue in establishing a crosswalk at that point to give residents of the proposed project access to the park south of Brink Road. The proximity of the access driveway and the crossing to the intersection of MD 27 and Brink Road, which is signalized, helps create gaps and thus opportunities to cross. 1/18 Tr. 33-37.

Technical Staff agreed that “. . .vehicular and pedestrian circulation will be adequate for the development proposed under this proposal.” Exhibit 53, p. 7. Later in its report, Staff added, “This proposal provides a safe, adequate pedestrian circulation system connecting external and internal sidewalks that move the residents safely through the neighborhood and to the proposed clubhouse recreation center.” Exhibit 53, p. 15

Thus, all the expert evidence – Applicants’ transportation planner, Technical Staff and the State Highway Administration – supported the conclusion that transportation facilities would be adequate for the proposed project. There is also no expert evidence to controvert Mr. Guckert’s testimony that the access and circulation would be safe for vehicular and pedestrian traffic. On the contrary, Technical Staff strongly endorses Mr. Guckert’s findings. Of course, all of these transportation issues will be analyzed in detail at site plan and subdivision reviews.

Based on this record, the District Council finds that Applicants have demonstrated that site access and circulation will be safe and efficient, and they have established a reasonable

⁴ PAMR has now been superseded by another form of traffic review called Transportation Policy Area Review (TPAR). Since Zoning Ordinance §59-H-2.4 (f) indicates that rezoning applications are to be analyzed by the Growth Policy (now called Subdivision Staging Policy) in effect when the application is filed, and this case was filed well before TPAR went into effect on January 1, 2013, this Opinion does not analyze TPAR. 1/18 Tr. 28-32.

probability that available transportation facilities will be adequate to serve the proposed development.

2. School Capacity:

The subject property is located in the area served by Cedar Grove Elementary School, Rocky Hill Middle School and Clarksburg High School. Bruce H. Crispell, Director of the Division of Long-Range Planning, Montgomery County Public Schools, stated in an e-mail to Technical Staff dated August 27, 2012 (Attachment 7 to Exhibit 53) that due to the age-restricted nature of the planned community, "there are no school age children anticipated, and therefore no impact on the public schools that serve this area . . ." Technical Staff indicated that no School Facilities Payment will be required. Exhibit 53, p. 5.

Given this record, the District Council finds that Applicants have demonstrated a reasonable probability that available school facilities will be adequate to serve the proposed development.

3. Water Service, Sewer Service:

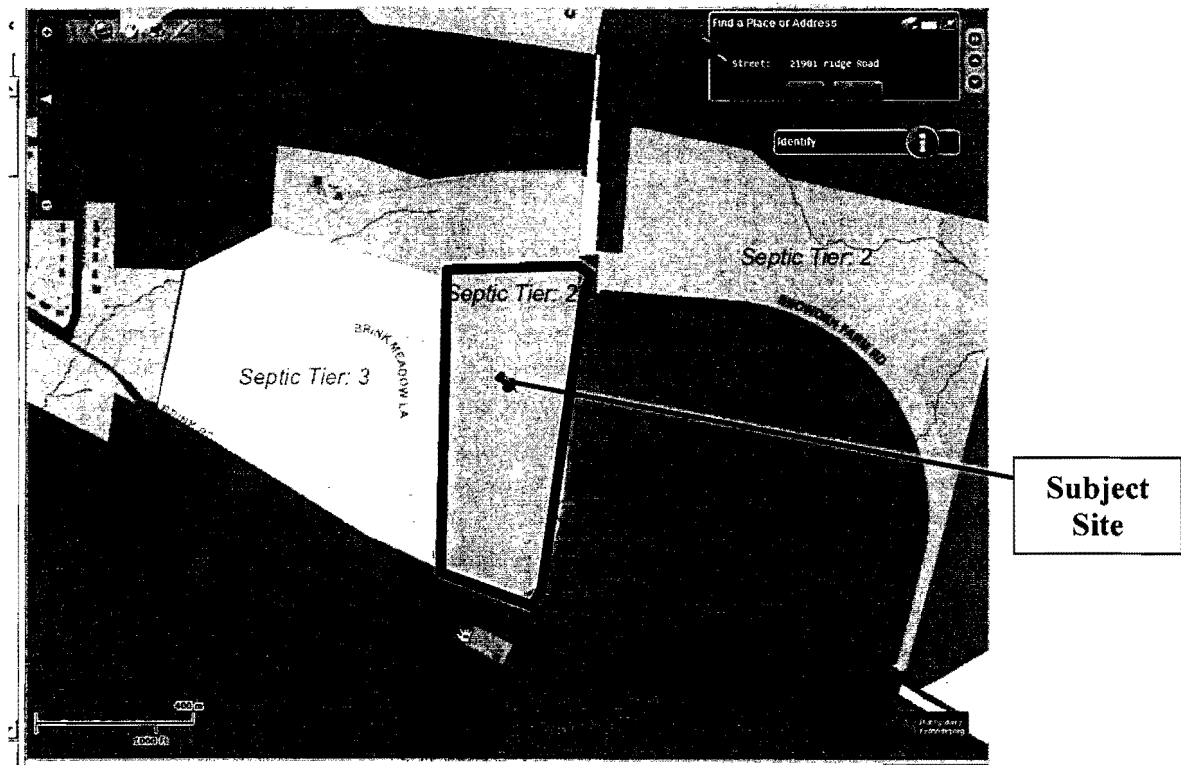
Technical Staff reports "This Subject Property is not currently served with public water or sewer and is located outside of the recommended water and sewer service envelope, as recommended in the *Clarksburg Master Plan and Hyattstown Special Study Area*, Figure 51, page 202." Exhibit 53, p. 5. Staff noted that in 2001, the property was granted a water and sewer category change, but the public sewer access was restricted to a private institutional use (PIF). Applicants have submitted another category change application to remove the PIF restriction, which would allow unrestricted water and sewer access. In Resolution 17-217, adopted July 19, 2011, the Council specified the existing W-1 public water category, but deferred action on the request for an S-3 sewer category (without restriction) pending a decision on the instant P-R-C zoning request. On May 7, 2013, the County Council approved Resolution 17-742 (Attachment A), which provided that the sewer category for the site would "advance[] . . . to unrestricted S-3 conditioned on County Council approval of the PRC Zone for the site under Zoning Application No. G-881."

Technical Staff recognizes that capacity exists to provide public sewer to this property, as confirmed by the Washington Suburban Sanitary Commission (WSSC). Exhibit 53, Attachment 5. Moreover, "Preliminary drawings showing how sewer service can be extended to the Property have been approved by WSSC." Exhibit 53, p. 5 and Attachment 6.

Applicants' civil engineer, Frank Bosson, testified regarding the availability of public water and sewer service for the property. He noted that public water is already available for this property. There are existing 16 inch, 24 inch, 48 inch lines in Maryland Route 27. There is existing 16 inch water main in Brink Road as well, so water access capacity is not an issue. However, when the 1994 Master Plan was adopted, there were sewage capacity and conveyance issues for the area of the subject site. The Crystal Rock Pump Station and the Seneca Waste Treatment Plant had capacity issues, and there was no way to bring sewer from this part of the County to the Seneca Wastewater Treatment Plant. In his opinion, that is why the subject site was designated for the RE-2 Zone. 1/18 Tr. 109-111.

In 2001, the County Council amended the comprehensive water and sewer master plan for development of this area. Capacity was then available at the sewage treatment plant, and at the Crystal Rock Pump Station. A conveyance system (a trunk line) also became available just to the south of the Clarksburg Village subdivision, which would allow this area of the County to have sewer conveyance from the east to the west. Exhibit 53, Attachment 5; 1/18 Tr. 109-111.

In 2012, the Maryland legislature passed the Maryland Sustainable Growth and Agricultural Preservation Act of 2012, which requires local jurisdictions across the State of Maryland to create a tier plan for availability of public sewer versus septic fields. This action was based on a concern with the amount of nitrogen runoff going into the Chesapeake Bay, much of which comes from septic fields. Montgomery County Park and Planning provided these tier maps. 1/18 Tr. 112-117. Exhibit No. 92 is a Tier Map covering the subject site, and a version of that exhibit from the Hearing Examiner's report is reproduced below.



As can be seen, the applicable Tier Map designates the subject site as within Tier 2 (also called "Tier II"). Tier 2 is defined as "Future Growth Areas Planned for Sewer." In September of 2012, the Council adopted SRA-12-01 (Ord. 17-20), which requires public sewer service in any area specified for Tier 2. This legislation has been codified in Montgomery County Code §50-35(e), which provides, in relevant part:

Sec. 50-35. Preliminary subdivision plans-Approval procedure.

(e) *Wells and septic systems. Before the Board approves a plan for lots with individual wells or septic systems, the plan must be approved by the Department of*

Permitting Services. The Board must review any plan that includes residential lots under the Maryland Sustainable Growth and Agricultural Preservation Act of 2012 (Sections 9-206 and 9- 1110 of the Environment Article, and Section 1-401 and Subtitle 5 of the Land Use Article).

(1) The official map displaying the Growth Tier areas as allowed under the Maryland Sustainable Growth and Agricultural Preservation Act of 2012 is on the Planning Department website at <http://www.montgomeryplanning.org/development/>. The Council may amend the official map either by:

- (A) adopting Tiers in a General Plan Amendment; or*
- (B) an amendment under Section 50-6A.*

* * *

(2) The Board must not approve any subdivision that would be served by one or more septic systems on land located in the Tier I area.

(3) The Board must not approve any major subdivision that would be served by one or more septic systems on land located in the Tier II area.
[Emphasis added.]

As suggested by Mr. Bossong, if Applicants were to apply for one or two acre lots with septic systems on the subject site, the Planning Board would likely reject such an application because it doesn't fit into the proper tier that the Council has mandated. 1/18 Tr. 112-117. Mr. Bossong also testified that Exhibit No. 34(t) shows a preliminary water and sewer layout approved by WSSC as part of their approval letter. Sewage will be collected by gravity to a sewer line that will be located in Snowden Farm Parkway; it will travel east to west to a proposed cul-de-sac in Clarksburg Village, which will be called Castle Oak Court. 1/18 Tr. 118-120.

Applicants' environmental expert, Dusty Rood, testified that the proposed connection to the public sewer system would significantly reduce the levels of contaminants flowing into the Bay. According to Mr. Rood, homes that are built on private septic systems load as much as 10 times the amount of nitrogen into the watershed as do public sewer facilities that treat them in a centralized wastewater treatment plant. 1/18 Tr. 77-78. See Hearing Examiner Report, pages 50-56. Thus, there is ample evidence to support the conclusion that the use of public sewer on this property is much better for the environment than septic fields, and the Council has conditionally approved the S-3 sewer category, allowing unrestricted public sewer service for the property upon approval of this rezoning.

The District Council finds that both public water and public sewer could reasonably be expected to be available for this development. Pending detailed review at subdivision, Applicants have sufficiently demonstrated the adequacy of public facilities at the rezoning stage.

The proposed P-R-C Zone is also clearly consistent with County policy of providing additional senior housing, as discussed at pages 20-21 of the Hearing Examiner's report.

In sum, based on this record, the District Council finds that the requested rezoning does not conflict with "other applicable County plans and policies."

§59-D-1.61(b): purposes, standards and regulations of the zone; safety, convenience and amenity of residents; and compatibility with adjacent development.

The second required finding is:

That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

The P-R-C Zone is a “floating zone,” and its purpose and regulations are found in Zoning Ordinance §§59-C-7.41 to 7.49.

Section 59-C-7.41 indicates that the purpose of the P-R-C Zone is to allow planned retirement communities, “accessible to or providing within” most of the day-to-day recreational, medical, retail, commercial and similar services required by the residents thereof. The section also provides that “Consideration must be given to the size of development (in acres) and the use of the site when determining whether day-to-day services and public facilities must be provided.” Finally, the provision calls for adequate highway access, public water and sewer, and minimum of impact upon the surrounding area.

Applicants’ Master Plan expert, Jennifer Russel, reviewed the legislative history leading to the present language of the purpose clause regarding access to services. 1/14 Tr. 232-233. In 2002, ZTA 2-05 split the P-R-C zone into two categories, one for properties with a minimum lot size of 25 acres and one for properties of at least 750 acres. In 2007, ZTA 06-27 was adopted, and it allowed off-site services in recognition of the fact that smaller sites would not have room to provide these needed services on site. That is the current language. Applicants’ land planner, Gary Unterberg, opined that the proposed development would provide adequate medical, retail, commercial and similar services to serve the residents of the community, in accordance with the purpose clause of the P-R-C Zone. 1/14 Tr. 134-136.

However, Technical Staff concluded that the proposed development would not satisfy the purpose clause because “the Property is not within the recommended water and sewer service envelope and . . . it does not contain the day-to-day services generally anticipated with a planned unit development. . . .” Exhibit 53, p. 9. Once again, the Planning Board disagreed with its Staff, stating (Exhibit 54, p. 1):

The Planning Board concluded that the proposed development did meet the purpose and intent of the Planned Retirement Community Zone. The Planning Board found that the location of the site within a short drive of shopping centers and other amenities, with a community center on site and a park within walking distance, satisfied the requirement in the purpose clause for adequate access to day-to-day and recreational services.

Both of the issues raised by Technical Staff were addressed at length in the Hearing Examiner’s report. The sewer service issue was discussed in Part III.D.4.c (pp. 46-50) and the access to day-to-day services was discussed in Part III.D.1 (pp. 17-19). Technical Staff admits that “connection to water and sewer is technically feasible . . .,” but because of its concerns

about Master Plan compliance, Staff does not feel that these services are available to the site, as required by the Purpose Clause. Exhibit 53, p. 9. The Hearing Examiner came to the opposite conclusion, based on the referenced discussion of State law, the Tiers Map and Council legislation on the point. The District Council agrees with the Hearing Examiner's conclusion.

The District Council is also persuaded, both by the legislative history of the current purpose clause and by the Planning Board's reasoning, that the limited on-site services and the availability of off-site services, accessible to the future residents of the proposed development, together satisfy the purpose clause on this point.

With regard to the language of the purpose clause calling for highway access and minimal impact on surrounding land, Technical Staff found that "The Property has good access to the adjacent major roadways, and . . . [t]he proposed development has avoided impact to sensitive natural resources. Particularly, it avoids the buffer, provides ample green buffers, forested areas and has to the extent possible, minimized impervious surfaces for purposes of water quality." This evidence is undisputed.

Based on this record, the District Council finds that the proposed development will satisfy the purpose clause of the P-R-C Zone.

The development standards for the P-R-C Zone are contained in Zoning Ordinance §§59-C-7.42 to 7.49. Mr. Unterberg testified that the proposed development would meet or better all the development standards of the zone. 1/14 Tr. 145-150. Each section is discussed below.

Section 59-C-7.42 specifies that the only development permitted in the P-R-C Zone is a planned retirement community, which is the case here. Subsection 59-C-7.421(b) specifies that in a development of less than 750 acres, there must be dwelling units, meeting rooms, and recreational facilities consistent with the size of the project. The Development Plan in the subject case does call for dwelling units, meeting rooms in an on-site community center, a community garden, pedestrian sidewalks and bike trails on site. Exhibits 939a) and (b). There will also be access to nearby parks and facilities in Clarksburg Village and its environs. As previously mentioned, Technical Staff feels that is insufficient, while the Planning Board disagrees.

Given the Planning Board's conclusion, the District Council finds that the proposed facilities meet the minimal standards required at the rezoning stage, recognizing that the available facilities will be re-examined by Technical Staff and the Planning Board as part of Site Plan review.

Subsections 59-C-7.422 and 59-C-7.423 specify permitted uses and special exception uses allowed in the Zone. No use is proposed by Applicants that would violate these provisions. In fact, §59-C-7.423 is not applicable to the proposed development, since it pertains only to "age-unrestricted area[s]," and Applicants are not proposing any age-unrestricted areas.

Section 59-C-7.43 requires that each P-R-C zone must have a gross tract area of at least 25 acres, and this proposal more than meets that minimum, with a gross tract area of 54.3 acres.

Section 59-C-7.44(a) provides:

A planned retirement community of less than 750 acres must be restricted to permanent residents 50 years of age or over, except, that a disabled relative may reside with a permanent resident. In addition, residence must be regulated in accordance with the provisions of the Fair Housing Amendments Act of 1988, as may be subsequently amended. The number of dwelling units must not exceed 10 per acre, except as further provided in Section 59-C-7.44(b)(3.).

As stated by Technical Staff (Exhibit 53, p. 12):

This rezoning request restricted its residency to those aged 50-years and older. The dwelling units per acre are 2.57, meeting the density provisions of this requirement. The Applicant is providing 12.5 percent MPDUs as required under Chapter 25(A).

It should also be noted that as a result of concerns expressed by the community at the hearing, a binding element was added to the Development Plan which limits residency to those 50 years of age or over except as provided by law.

The District Council finds that Applicants' proposal meets the requirements of §59-C-7.44(a).

Section 59-C-7.45(b) provides the required setbacks for a development of less than 750 acres. It specifies that:

. . . all buildings and structures must be set back at least as follows:

- (1) Not less than the setback of the adjacent zone.*
- (2) Additional setback must be provided from adjacent one family residential development if the building or structure proposed is higher than 35 feet. The additional setback must be a minimum of 2 feet for each foot of building above 35 feet.*

Technical Staff found that the proposed development more than complies with the Zone's setback and height requirements. Exhibit 53, p. 12. There is no evidence to the contrary, and the District Council therefore finds that Applicants have complied with this provision.

Section 59-C-7.461 addresses building coverage limits, but it is inapplicable because it only pertains to developments of 750 acres or more.

Section 59-C-7.462(b) specifies that in a development of less than 750 acres, not less than 50 percent of the gross area must be devoted to green area. Technical Staff reports this project meets that standard, since it proposes more than 50 percent of the gross area devoted to green area. Exhibit 53, p. 13. The District Council so finds.

Section 59-C-7.47(b) specifies that, in a development of less than 750 acres, no building except a church tower may exceed 100 feet in height. As stated by Technical Staff, this

development meets this standard because “No buildings are proposed to be greater than 35-feet tall.” Exhibit 53, p. 13.

Section 59-C-7.48 addresses roads, parking and school sites. Specifically, Subsection 59-C-7.481 specifies that off-street parking must be provided in accordance with the requirements of Zoning Ordinance Article 59-E. Technical Staff found that “[t]he proposed Development Plan meets the off-street parking requirements of §59-E-3.7 (Schedule of Requirements) as it is providing at minimum, 2 parking spaces per one-family residences. The actual size of the clubhouse will be determined at site and preliminary plan stages, but the applicant[s] will provide the required number of spaces under §59-E-3.7.” Exhibit 53, p. 13. This evidence is undisputed, and the District Council finds that Applicants are in compliance.

Subsection 59-C-7.482 provides that “Interior roads not dedicated to public use must have a minimum width of 22 feet for two-way traffic and 12 feet for one-way traffic and must be paved and maintained in good repair.” Technical Staff found (Exhibit 53, p. 13):

Although final road designations and design will occur at preliminary plan, the Applicant is proposing public, tertiary residential streets with, twenty feet of pavement and a five-foot sidewalk on one side.

Based on the evidence that the internal roads will be public roads, the District Council finds that Applicants are compliant with this section.

Subsection 59-C-7.483, which addresses dedication of land for school sites, is inapplicable because there will be no age-unrestricted section of the development.

Section 59-C-7.49 specifies procedures for the application and its review, and establishes a limitation on future reclassifications. Applicants have complied with this section by submitting a development plan in accordance with Zoning Ordinance §59-D-1. This application will be reviewed by the Planning Board at site plan, in accordance with Zoning Ordinance §59-D-3. The final restriction in this section applies to any application for future reclassification of land already in the P-R-C Zone, so it is inapplicable to the instant application.

Based on this record, the District Council finds that Applicants’ development plans are in accordance with all of the purposes, standards and regulations of the P-R-C Zone, as set forth in Article 59-C of the Zoning Ordinance.

The next part of “Finding (b)” required by Section 59-D-1.61 is a determination that the proposed development would provide the “maximum safety, convenience, and amenity of the residents.” A reasonable interpretation of this section, in light of the P-R-C Zone’s requirement for a post-rezoning site plan review, is that the modifier “maximum” was not intended to imply a requirement for the inclusion of every possible amenity. As mentioned in the discussion of the P-R-C Zone’s purpose clause, the access to amenities and other services was discussed in Part III.D.1 (pp. 17-19) of the Hearing Examiner’s report. Applicants’ land planner, Gary Unterberg, testified that the proposed development plan would provide for the maximum safety, convenience, and amenity of the residents to the development. 1/14 Tr. 150-152. Technical

Staff disagreed, but the Planning Board concluded “that the location of the site within a short drive of shopping centers and other amenities, with a community center on site and a park within walking distance, satisfied the requirement in the purpose clause for adequate access to day-to-day and recreational services.” Exhibit 54, p. 1. The safety issue was discussed above and in Part III.D.4.a of the Hearing Examiner’s report, at pages 41-46.

Based on this record and subject to site plan review, the District Council finds that Applicants have provided for the maximum in safety, convenience and amenity for the future residents of this development.

The final required determination under “Finding (b)” is that the proposed development be compatible with adjacent development. The issue of compatibility was discussed in Part III. E of the Hearing Examiner’s report (pp. 58-62) in connection with community concerns and in Part IV.B.2.c of that report (pp. 76-77).

Applicants’ land planner, Gary Unterberg, opined that the difference in density between the proposed development and the surrounding uses does not raise issues of compatibility for a number of reasons. First, this development would be a like use to the surrounding area – single-family, detached homes. Secondly, it would exceed the space (*i.e.*, minimum tract area) requirements of the P-R-C zone. In addition, the RE-2 zone adjacent to the subject site has a building coverage maximum of 25 percent, and the actual building coverage on the proposed development will be similar. Even though the P-R-C Zone does not prescribe a maximum building coverage for a site this size, this project will have a building coverage of less than 25 percent because a binding element restricts the impervious area to 28 percent, and that includes the roads. Moreover, Applicants are proposing a maximum height of 35 feet, while the maximum height for the RE-2 Zone is 50 feet. The proposed development will also exceed the required setbacks on the west by an average of three times, and with at least 70-foot setbacks on the east, the project will far exceed the front setback of 50 feet required from the RDT Zone. Finally, Ridge Road is elevated, and the land will slope down five to ten feet from the road, depending on the final grade. Thus, the homes in this development will be set down lower than Ridge Road. Because of the setback and the grading, they will be less noticeable to Ridge Road than the existing homes. Based on all these factors, Mr. Unterberg concluded that the planned project will be compatible with the surrounding area. 1/14 Tr. 156-158.

In addition, ample screening is planned for the site to aid in compatibility, especially to the north, the west and the south, as shown on pages 21-23 of the Hearing Examiner’s report. Moreover, a note has been added to the final development plan, by which Applicants agree to plant screening trees in the area adjacent to the proposed extended-detention (dry) ponds to the extent that governmental agencies allow reduction in the size of these stormwater management facilities. Alternatively, Applicants have agreed to add screening trees to the adjacent lots if no space is available next to the dry ponds on the subject site.

As to compatibility, Technical Staff found that the proposed use is similar in nature to all the uses surrounding the site, in that all are residential. However, Staff felt that the proposed density exceeded that which was recommended in the Master Plan, thereby reducing compatibility. Exhibit 53, p. 15. On the other hand, the Planning Board found the opposite:

“The Development Plan provides a low density transition which, coupled with the forest buffers and setbacks, provides compatibility with the surrounding community.” Exhibit 54, p. 2.

The Hearing Examiner agreed with the Planning Board, as does the District Council. Given the similar uses, the large setbacks, the extensive screening which is planned, the afforestation required by the approved Preliminary Forest Conservation Plan, and the other factors mentioned above, the District Council finds that the proposed development will be compatible with adjacent development.

§59-D-1.61(c): safe, adequate & efficient internal vehicular and pedestrian circulation systems.

The third required finding is “[t]hat the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.”

The issue of site access and circulation was discussed above and in Parts III.D.4.a of the Hearing Examiner’s report (pp. 41-46). As noted, Applicants’ transportation planner, Wes Guckert, testified that the proposed circulation systems for pedestrians, vehicles, and bicycles will be safe, adequate and efficient. 1/18 Tr. 33.

Technical Staff agreed that “. . .vehicular and pedestrian circulation will be adequate for the development proposed under this proposal.” Exhibit 53, p. 7. Later in its report, Staff added, “This proposal provides a safe, adequate pedestrian circulation system connecting external and internal sidewalks that move the residents safely through the neighborhood and to the proposed clubhouse recreation center.” Exhibit 53, p. 15. Staff also stated, “The internal and external vehicular circulation patterns are safe, adequate and efficient.” Exhibit 53, p. 16. There is no contradictory expert evidence in the record.

Although all of the transportation issues will be analyzed in more detail at site plan and subdivision reviews, the District Council finds, based on the current record, that the proposed internal vehicular and pedestrian circulation systems and points of external access will be safe, adequate and efficient for both vehicular and pedestrian traffic.

§59-D-1.61(d): preventing erosion, preserving vegetation, forest conservation and water resources.

As discussed in Part III.D.5 of the Hearing Examiner’s report (pp. 50-56), the site is located within the Clarksburg Special Protection Area (SPA), and there are no streams, floodplains or wetlands on the property. Exhibit 53, p. 8. On January 16, 2013, the Planning Board approved both a Preliminary Forest Conservation Plan (Exhibit 89(a)) and a Preliminary Water Quality Plan (Exhibit 89(b)).

The afforestation areas, as provided for in Applicants’ approved Preliminary Forest Conservation Plan (PFCP -Exhibit 41(c)), are depicted on page 22 of the Hearing Examiner’s report. No forest will be cleared; 0.21 acres of forest will be retained; and there will be 7.2 acres of afforestation, which is about 35 times the amount of existing forest on site. These areas will be protected in perpetuity through a Category One Conservation Easement.

Development Plan Binding Element #3 limits the impervious area of the development to 28 percent of the net area of 49.4 acres. Exhibit 94(a). Technical Staff indicates that this limitation is consistent with the Department of Permitting Services' Stormwater Management Design Computations. Exhibit 53, p. 8. Applicants' civil engineer, Frank Bossong, testified that Applicants will meet all of the environmental site design requirements for stormwater management, both for the State and the County. 1/18 Tr. 98-101. Mr. Bossong testified that even if both the dry ponds planned for the western edge of the site were made smaller, so as to allow for a greater amount of screening in those areas, Applicants could still meet all of the environmental site design requirements using the bioretention facilities planned throughout the site. 1/18 Tr. 98-101. Given this testimony, the Council does not preclude a reduction in the size of the retention ponds to allow further screening on the west, should the Planning Board determine that is advisable at Site Plan and Subdivision reviews.

Technical Staff concluded that "The site is in compliance with the requirements of Chapter 22A, Forest Conservation, and Chapter 19, Water Quality. . . . The Property by its nature is relatively flat and does not contain any excessive[ly] steep slopes that would otherwise cause concern for erosion or require unreasonable grading to allow development. . . ." Exhibit 53, p. 16.

Based on this record, the District Council finds that forest conservation, stormwater management and erosion controls meet the requirements called for by "Finding (d)."

§59-D-1.61(e): common area maintenance.

The fifth required finding is "[t]hat any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient."

Applicants Theodore H. Butz, et al. are the owners of the subject site. Exhibit 70. They have submitted a "Declaration of Covenants, Conditions and Restrictions for Orchard Run Homeowners' Association, Inc.,"⁵ which provides for the maintenance of any areas intended to be used for recreational or other common or quasi-public purposes. Exhibit 96(a). Applicant Thompson Butz testified that these homeowners' association documents show the method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes. 1/14 Tr. 38-39. In addition, Elm Street Development has extended an invitation to Applicants to join Clarksburg Village's homeowners' association if the rezoning is approved. 1/14 Tr. 254.

The District Council finds that Applicants have sufficiently demonstrated both ownership of the property and their commitment to perpetual maintenance of all recreational and other common or quasi-public areas.

⁵ "Orchard Run" was the name first used to describe this project when the application was initially filed. It is now being called the "Courts at Clarksburg" by Applicants.

The Public Interest

The Applicant must show that the proposed reclassification is sufficiently in the public interest to justify its approval. As stated in the Maryland Land Use Article, MD Code §21-101(a)(4)(i) (2012),

(i) planning, zoning, or subdivision control powers in the regional district [must be exercised to:]

(1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;

(2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and

(3) protect and promote the public health, safety, and welfare.⁶

When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of MPDUs.

The issue of Master Plan conformance was discussed above and at length in Part III.D.3. of the Hearing Examiner's report (pp. 32-41). As explained there, Technical Staff recommended denial of this application (Exhibit 53), but the Planning Board supported the proposed rezoning by a unanimous vote (Exhibit 54). The District Council finds the Planning Board's interpretation of its Clarksburg Master Plan to be more persuasive than Technical Staff's interpretation, and more likely to produce a result in the public interest.

The impact on public facilities was discussed above. The evidence indicates that transportation, schools and water and sewer services would not be adversely affected by the proposed development.

Moreover, as discussed in Part III. D.5. of the Hearing Examiner's report, the proposed development would not have an adverse effect on the environment. On the contrary, significant afforestation will be made on the site; the proposed stormwater management system will result in less stormwater flowing off the property than today; the elimination of farming on the site will reduce nitrogen runoff into the Chesapeake Bay; and the proposed connection to the public sewer system would further reduce the level of contaminants flowing into the Bay. *See* Hearing Examiner's Report, pages 50-56.

In addition, as discussed in Part III.D.1 of the Hearing Examiner's report, the public would clearly be served by the provision of additional housing for seniors, which is needed in the County. *See* Hearing Examiner's Report pages 20-21. The proposal will also provide 18 MPDUs on site, which will add to the County's stock of affordable housing.

⁶ Effective October 1, 2012, the Regional District Act, Article 28, Md. Code Ann., was re-codified, without a change in substance, into a new "Land Use Article." Section § 21-101(a)(4)(i) of the Land Use Article contains the rough equivalent of the previous language in Article 28, Md. Code Ann., § 7-110.

Given the developments since the Master Plan was approved; the changes in the environmental concerns regarding sewer hookups; the ability to provide significant screening for the immediate neighbors to improve compatibility; and the public interest in providing additional senior housing and MPDUs in the County, the District Council concludes that the proposed development would be in the public interest.

Conclusion

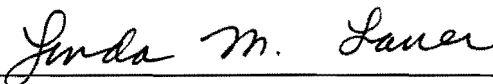
Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the proposed development satisfies the intent, purpose and standards of the P-R-C Zone; that it meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance; that the application proposes a project that would be compatible with development in the surrounding area; and that the requested reclassification to the P-R-C Zone would be in the public interest. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-881, requesting reclassification from the RE-2 Zone to the P-R-C Zone of approximately 54.34909 acres of land described as Parcel P429 on Maryland Tax Map FV 122 (a/k/a, the "Butz Property" or the "Water Tank Farm Property"), and located at 21901 Ridge Road, Germantown, Maryland, in the 2nd Election District, is hereby **approved** in the amount requested and subject to the specifications and requirements of the revised Development Plan, Exhibit 94(a), provided that Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council